

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0253
Gross Retail & Use Taxes
For Years 2001 & 2002**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail and Use Taxes—Motorcycles

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-5-15; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; 45 IAC 2.2-4-1; 45 IAC 2.2-5-21; 45 IAC 2.2-1-1

Taxpayer protests the assessment of the state's gross retail tax on out-of-state sales of ATV's and/or motorcycles, arguing that since the Indiana Bureau of Motor Vehicles stated no gross retail tax was owed because the vehicles were not to be licensed in Indiana, these transactions were exempt.

II. Penalty—Request for Waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b)

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

STATEMENT OF FACTS

Taxpayer is a dealer of Polaris, Suzuki, and Kawasaki all-terrain vehicles (ATV's) and motorcycles. Taxpayer also sells parts and sundries, and services all makes and models of motorcycles. Taxpayer's sales are both retail and wholesale. The transactions at issue concern sales to out-of-state customers who came into Indiana, purchased the vehicles, and then took them out-of-state for registration and licensing in their home states. There is also an issue concerning the proper exemption certificates that taxpayer needed to support the exemption claim. Additional facts will be supplied as required.

I. Gross Retail and Use Tax—Motorcycles

DISCUSSION

Taxpayer protests the proposed assessment of use tax on sales of ATV's and motorcycles where out-of-state customers came into Indiana, purchased the vehicles, and then took them out-of-state for registration and licensing. Taxpayer alleges that Indiana's Bureau of Motor Vehicles informed taxpayer's representative that since the vehicles at issue were off-road, they did not require registration and licensing by the State of Indiana, and therefore taxpayer was not required to collect and remit the state's gross retail tax on these transactions.

The audit argues that taxpayer incorrectly assumed these retail transactions were exempt based on the Bureau's representations, and, moreover, the ST-105's submitted as proof of exemption would not be accepted because taxpayer should have used properly executed ST-137's its exemption claim. The audit's argument is therefore two-fold: these transactions are not exempt; even if they were exempt, taxpayer used an incorrect exemption certificate form to support the claim for exemption. As stated in the audit report:

The taxpayer feels that the ATV's sold for use outside Indiana should be exempt from the Indiana gross retail tax under. . . motor vehicles transported to a destination outside Indiana.

The auditor was informed by the taxpayer that the taxpayer asked the license branch in . . . if the ATVs sold for use outside of Indiana are subject to the gross retail tax. Per the taxpayer, the license branch informed the taxpayer that these sales are not subject to the gross retail tax.

The taxpayer did not have any exemption certificates on file for the ATV's sold for use outside of Indiana. The auditor gave taxpayer's accountant, . . . , Form ST-137 (Certificate of Exemption for Out-of-State Delivery of Motor Vehicle, etc.) to obtain for the ATVs sold for use outside Indiana. The next day the taxpayer contacted the auditor about the Form ST-137 stating that this form would not be appropriate since the ATVs do not have to be licensed or registered. The taxpayer was informed since the ATVs do not have to be licensed or registered there are no exemption certificates for the ATVs sold for use outside of Indiana and the taxpayer would be liable for the gross retail tax on these ATV's.

At the final conference with the taxpayer's accountant, the taxpayer had obtained five Form ST-105 from their out-of-state customers. The taxpayer was informed that these would not be acceptable.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an "excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction." An exemption is provide in IC § 6-2.5-3-4 if "the property was acquired in a

retail transaction and the state gross retail tax” was paid at the time of purchase. Taxpayers are personally liable for the tax. (IC § 6-2.5-3-6). IC § 6-2.5-3-7 provides that a “person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;” therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4.

The issues in this case are whether gross retail taxes were due on these transactions, collected and remitted to the State of Indiana, or if the transactions were exempt. If the transactions were not exempt, taxpayer remains liable for the uncollected and unremitted gross retail tax.

45 IAC 2.2-1-(c) provides in pertinent part:

The state gross retail tax is imposed on retail transactions made in Indiana. . . The first category is described as transactions of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1.

45 IAC 2.2-4-1(a) provides in pertinent part:

Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail
...

See also, IC § 6-2.5-4-1.

IC § 6-2.5-5-15 provides in pertinent part:

Transactions involving motor vehicles, trailers, watercraft, and aircraft are exempt from the state gross retail tax, if:

- (1) upon receiving delivery of the motor vehicle, trailer, watercraft, or aircraft, the person immediately transports it to a destination outside Indiana;
- (2) the motor vehicle, trailer, watercraft, or aircraft is to be titled or registered for use in another state; and
- (3) the motor vehicle, trailer, watercraft, or aircraft is not to be titled or registered for use in Indiana.

45 IAC 2.2-5-21 provides in pertinent part:

The state gross retail tax shall not apply to sales of motor vehicles, trailers, and aircrafts, delivered in Indiana for immediate transportation to a destination outside of Indiana and for licensing or registration for use in another state, and not to be licensed or registered in Indiana.

Based on the statutes and regulations cited *supra*, taxpayer’s transactions of licensed vehicles were retail transactions exempt by both statute and regulation from the imposition of Indiana’s gross retail tax. The cited language is clear and unambiguous. Both the ST-105 and ST-137 require signatures signed “under penalty of perjury.” The ST-137 requires a bit more information, but the information is sufficient to support an exemption claim in this instance.

FINDING

Taxpayer's protest, concerning the assessment of gross retail tax on out-of-state sales where the tangible personal property was immediately moved and licensed outside the state, is sustained. If the vehicles were not licensed out-of-state, the exemption does not apply, and the applicable tax is owed to the Department.

I. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due. Taxpayer's representative stated in the Letter of Protest and at the hearing that taxpayer relied on the information obtained from the Indiana Bureau of Motor Vehicles, and that the failure to pay the proper amount of tax was due to that state agency's interpretation of Indiana's statutes, regulations, and case law.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the penalty on that part of the assessment that was successfully protested is appropriate in this particular instance. The penalty remains on that part of the assessment that was unsuccessfully protested.